80-322

Supreme Court, U. S.
FILED
AUG 29 1980
MICHAEL RODAK, JR., CLERK

Case No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

STEPHEN PAUL KORN
Appellant

-v-

THE STATE OF OHIO
Appellee

ON APPEAL FROM THE
COURT OF APPEALS OF OHIO,
MARION COUNTY

APPENDIX TO JURISDICTIONAL STATEMENT

STEPHEN PAUL KORN
17615 Adrian Road
Southfield, Michigan
48075
1-313-353-1240

THE SUPREME COURT OF OHIO

THE STATE OF OHIO
CITY OF COLUMBUS
STATE OF OHIO,
Appellee,

vs.

Stephen Paul Korn,
Appellant.

1980 Term
To wit: June 20, 1980
No. 80-638
Appeal from the Court of Appeals for Marion County

This cause, here on appeal as of right from the Court of Appeals for Marion County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Marion County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this _____ day of Jul 1 1980 19___

(Thomas L. Startzman Clerk
(Sam J. Adkins Deputy

IN THE COURT OF APPEALS OF THE
THIRD APPELLATE JUDICIAL DISTRICT
OF OHIO

STATE OF OHIO; PLAINTIFF-APPELLEE; v.
STEPHEN PAUL KORN, DEFENDANT-APPELLANT.

MEMORANDUM OPINION

(CASE NUMBER 9-79-7 - Decided March 4, 1980)

APPEAL: Court of Appeals for Marion County.

MR. STEPHEN PAUL KORN, In Propria Persona, Appellant.

MR. JONATHAN WILLIAMSON, Assistant Law Director, for Appellee.

PER CURIAM. This is an appeal from a judgment of conviction and sentence entered by the Marion Municipal Court.

Defendant, appellant herein, was charged with a violation of R.C. 4511.20 entitled "Speed Limits," the express allegation of the Traffic Ticket being "speed over limit 71 MPH in 55 MPH zone."

Defendant entered a plea of not guilty and the matter was tried to the court with defendant representing himself. The trial resulted in a judgment of guilty and the assessment of a fine in

the amount of twenty-five dollars plus costs.

Defendant is appealing from the judgment.

He asserts that the appeal involves two areas of concern, the first being that of Due Process and Due Course of Law violations with respect to the proceedings in the lower court and the second involving the findings of the lower court with respect to a purported violation of R.C. 4511.21.

Defendant sets forth nineteen assignments of error in his brief filed herein.

We first observe that no transcript was made of the proceedings at trial.

Defendant transmitted to the clerk of the court of appeals for filing in the appellate court a statement of evidence pursuant to App. Rule 9(C) which was struck from the record by this court for the reason that the statement had not been settled and approved by the trial court. Some forty days after the remaining portion of the record had been transmitted to the court of appeals defendant sought leave to file the statement of evidence which this court denied.

App. Rule 9(A) provides: "The original papers and exhibits thereto filed in the trial court, the transcript of the proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court shall constitute the record on appeal in all cases."

The transcript of trial proceedings may be in the form of a statement of the evidence or proceedings when no report of the evidence at trial was made. App. Rule 9(C).

There being no transcript of the proceedings at trial and no statement of evidence in lieu thereof, the record before this court consists of the original papers and certified copies of the docket and journal entries.

A court of appeals is bound by the record before it and may not consider facts extraneous thereto. Paulin v. Midland Mutual Life Ins. Co., 37 Ohio St. 2nd 109.

It is also incumbent upon the appellant in any appeal to affirmatively display the error of which he

complains.

With this in mind we come to a consideration of defendant's assignments of error.

The first four assignments of error will be considered together. They are in necessary part as follows:

> "1. The Trial Court erred in failing to honor the Defendant-Appellant's demand for a trial by jury, wherein the proceeding was criminal, and the accused was not offered the Constitutional safeguards of fundamental fairness, to wit:
>
> "a) No record was taken of the trial proceedings, to protect the Defendant-Appellant in the absence of a jury, from arbitrary and tyrannical rule, assuring his right to an effective appeal, and maintaining the integrity of the Courts;
>
> "b) At no time was the accused, standing before the Court alone, in the absence of a jury, and in the absence of a trial record, advised of any Constitutional or Statutory rights;
>
> "c) At no time was the accused advised of his right to Counsel, or offered the assistance thereof;
>
> "denying the accused the unqualified protection against arbitrary and tyrannical rule as set forth in the language and spirit of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, Section 5, Article I, Section 10, and Article I, Section 16 of the Constitution for the State of Ohio. * * *

"2. The Trial Court erred in failing to use a recording device to preserve a record of the trial proceedings, wherein the proceeding was criminal, and the accused was tried in the absence of a jury, denying the accused the unqualified protection against arbitrary and tyrannical rule, as set forth in the language and spirit of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, Section 5, Article I, Section 10, and Article I, Section 16 of the Constitution for the State of Ohio. * * *

"3. The Trial Court erred in failing to prepare a fair, unbiased, impartial, bona fide Settlement and Approval of the Statement of Evidence and Proceedings, and the Objections thereto, submitted by the State and the accused, wherein the proceeding was criminal, and the accused was tried in the absence of a jury, and in the absence of a record of the proceedings, denying the accused the unqualified protection against arbitrary and tyrannical rule, as set forth in the language and spirit of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, Section 5, Article I, Section 10, and Article I, Section 16 of the Constitution for the State of Ohio. * * *

"4. The Trial Court erred in failing to advise the accused, standing before the Court alone, in the absence of a jury, and in the absence of a trial record, of any Constitutional Rights, Statutory Rights, or Rights pursuant to Court Rules designed to insure that an accused be afforded a just and fair hearing, denying the accused the Constitutional safeguards of fundamental fairness, to wit: * * *"

R.C. 2945.17 provides that "At any trial, in any court, for the conviction of any statute of this state,

or of any ordinance of any municipal corporation, except in cases in which the penalty involved does not exceed a fine of one hundred dollars, the accused has the right to be tried by a jury."

In Cheff v. Schnakenberg, 384 U.S. 373, the Supreme Court held that, in a prosecution for a petty offense, a defendant was not entitled to a jury trial.

A "petty offense" is defined by 18 U.S.C. 1, as any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500 or both.

The Court in Duncan v. Louisiana, 391 U.S. 145, reaffirmed the Cheff holding, saying at page 160, "(s)o-called petty offenses were tried without juries both in England and in the Colonies and have always been held to be exempt from the otherwise comprehensive language of the Sixth Amendment's jury trial provisions. * * * the possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications."

In Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216, 220, the Court further indicated that, although the Court had not had occasion to "state precisely where the line falls between punishments that can be considered 'petty' and those that cannot be * * * it is clear that a six-month sentence is short enough to be 'petty'."

Criminal Rule 2 defines a "serious offense" as a felony, or a misdemeanor for which the penalty prescribed by law includes confinement for more than six months and a "petty offense" as a misdemeanor other than a serious offense.

R.C. 4511.99 establishes a first violation of R.C. 4511.21 as a minor misdemeanor, the penalty for which is set by R.C. 2929.21(D) as "not more than one hundred dollars."

We conclude that the provisions of R.C. 2945.17 are well within the guidelines of Cheff v. Schnakenberg, Duncan v. Louisiana, and Dyke v. Taylor Implement Mfg. Co., supra, and that no prejudicial error resulted from the trial court's refusal to grant defendant a jury trial.

Criminal Rule 22 provides that:

> "In serious offenses cases all proceedings shall be recorded.
>
> "In petty offense cases all waivers of counsel required by Rule 44(B) shall be recorded, and if requested by any party all proceedings shall be recorded.
>
> " * * *"

There is nothing in the record before us to indicate that defendant had requested that the proceedings be recorded in accordance with Criminal Rule 22. See State v. Gartana, 44 Ohio App. 2nd 233.

However, defendant further asserts that by virtue of a silent record it cannot be affirmatively shown that he was advised of his constitutional rights nor can a waiver of such rights be assumed from such a record.

He relies on Cleveland v. Whipkey, 29 Ohio App. 2nd 99, decided January 27, 1972, for the proposition that the record must reveal a compliance with all constitutional safeguards.

We first note that this case deals with a guilty plea and, secondly, in the later case of East Cleveland v. Dragonette, 32 Ohio St. 2nd 147, a per curiam

opinion, also involving a guilty plea the Supreme Court said at pages 148 and 149:

> " * * * the record before the Court of Appeals consisted only of the transcript of the Municipal Court's docket and journal entries, and that transcript failed to demonstrate the error complained of, i.e., error in accepting defendant's plea of guilty. This being so, there is nothing presented by defendant upon which a reviewing court can determine whether error was committed by the trial court.
>
> " * * * A party, having the duty of instituting the preparation of a record for the purpose of appeal, may not siti idly by and then predicate reversal upon the basis of a 'silent record.'"

No error prejudicial to defendant resulted from the lack of a record being taken in the trial court absent a request therefor by defendant.

The third assignment of error asserts unconstitutionality of App. Rules 9 and 10 and Local Rule 3 of this court in that they place an undue burden upon defendant in perfecting his appeal by requiring him to prepare a statement of the evidence in the absence of a transcript of the proceedings at trial.

Local Rule 3 of this court merely reasserts the requirements of R.C. 2505.08 as to the filing of a praecipe and a deposit of fees with the clerk and sets

forth the form of the praecipe required.

App. Rule 9 defines and determines the record on appeal and App. Rule 10 sets forth the time and method of transmitting the record to the clerk of the court of appeals.

There is no constitutional right to appeal under the U.S. Constitution (Ross v. Moffit, 417 U.S. 600, 610-611) nor does the Ohio Constitution guarantee such a right. Middletown v. City Commission, 138 Ohio St. 596, 603.

The state may prescribe rules as to appellate procedure and no violation of constitutional law is involved in a court's insistence that a statutory right of appeal be excerised according to the lawful rules of the court. 16 Am. Jur. 2nd 990, Constitutional Law, Section 584.

We find no constitutional issue involving the rules of appellate procedure insofar as they establish procedure for preparing and transmitting the appellate record and overrule defendant's third assignment of error.

The fourth assignment of error deals with the

failure of the trial court to advise the accused of his right to counsel or to offer him the assistance of counsel.

It is highly questionable that this issue is before this court as nothing in the record affirmatively shows that the trial court failed to so advise defendant.

However, in any event, no prejudicial error resulted therefrom.

Criminal Rule 44(B) provides that "Where a defendant charged with a petty offense is unable to obtain counsel, the court may assign counsel to represent him. When a defendant charged with a petty offense is unable to obtain counsel, no sentence of confinement may be imposed upon him, unless after being advised by the court, he knowingly, intelligently, and voluntarily waives assignment of counsel."

The record before us would not indicate any inability on the part of defendant to obtain counsel. On the contrary according to the original papers, five days following the arrest, defendant's father, an attorney at law, wrote to the clerk of the court seeking

information as to whether the matter could be resolved at a pre-trial conference or by mail, thus indicating that defendant had counsel. On the same date defendant forwarded to the court a demand for jury trial and a statement to the clerk of the court asking the clerk to "please enter my appearance as defendant in the above entitled cause in pro per."

The latter statement can only be reasonable interpreted to mean that defendant was entering his appearance in propria persona, i.e., in his own person or behalf without counsel. See Ballentine's Law Dictionary, Third Edition (1969) page 633.

The constitutional right to counsel only extends to those instances wherein imprisonment may be imposed. Scott v. Illinois, U.S., 99 S. Ct., 1158; Argersinger v. Hamlin, 407 U.S. 25. No imprisonment was authorized or imposed for this offense.

The fourth assignment of error is not well taken.

We have found no error prejudicial to defendant in the individual issues set forth by defendant in the first four assignments of error nor do we find any prejudicial error in these issues when considered

collectively as indicated by defendant.

Assignments of error number five, six, seven, eight, nine, ten and eleven deal with the admission into evidence of the MR7 radar results.

There being no record of the trial proceedings before this court, there is no affirmative display of the error claimed and thus no prejudicial error to defendant.

We parenthetically note that in State v. Staggs, Unreported Hancock County Case No. 5-76-18, decided January 26, 1977, this court stated that the reliability of the MR7 radar device would be judicially noticed thus dispensing with the necessity of expert testimony as to its nature and function or the scientific principles underlying the same.

Assignments of error numbers twelve, thirteen, fourteen, and fifteen are as follows:

> "12. The Trial Court erred in failing to allow the accused his Constitutional right to challenge the Constitutionality of a law in a Court of law, specifically, R.C. 4511.21 * * *
>
> "13. The Trial Court erred in its erroneous finding that the Defendant-Appellant's speed was greater than reasonable or proper under the circumstances as set forth in R.C. 4511.21

"14. The Trial Court erred as the Defendant-Appellant was compelled to be a witness against himself, in violation of the Fifth and Fourteenth Amendments to the United States Constitution, and in violation of the Ohio Constitution, Article I, Section 10, in the absence of a jury, in the absence of a record, and in the absence of Counsel. * * *

"15. The Trial Court erred in denying the Defendant-Appellant's objection that he was not properly charged with particularity and in accordiance with the statutory provisions of R.C. 4511.21."

These assignments assert error which could only be displayed by reference to the trial court transcript which is not before us and must, therefore, be overruled.

Assignment of error number sixteen:

"16. The Trial Court erred in denying the accused the equal protection under the laws of the State of Ohio, in contravention of the Fourteenth Amendment of the United States Constitution, and Article I, Section 2 of the Constitution for the State of Ohio."

Defendant's argument hereunder is directed to the failure of the trial court to make a record in the trial court and to correctly settle the statement of evidence submitted to the trial court by defendant.

The failure to record the trial proceedings is fully disposed of above. Since the statement of evidence was struck from the files and is thus not a

part of this appeal, no prejudicial error appears from the manner in which it was settled.

Assignments of errors numbers seventeen, eighteen, and nineteen as follows:

> "17. The Trial Court erred in denying the Defendant-Appellant's Motion for a Directed Verdict, the State having failed to bear its statutory burden of proof, pursuant to R.C. 2938.08, R.C. 2901.05, and the Common Law burden thereof.
>
> "18. The Trial Court erred in conducting a trial of an accused in violation of R.C. 2901.04.
>
> "19. The Trial Court erred in finding an innocent person guilty in violation of conscience, law, and fact."

These assignments of error go to the weight and sufficiency of evidence and the conduct of the trial and cannot be reviewed in the absence of a transcript of the trial proceedings.

Additionally, assignments of error numbers eighteen and nineteen were not argued and pursuant to Appellate Rule 12, may be disregarded.

Finding no error prejudicial to defendant as assigned and argued, we must affirm the judgment of the trial court.

Judgment affirmed.

GUERNSEY, P.J., COLE AND MILLER, J.J., concur.

IN THE COURT OF APPEALS FOR MARION COUNTY, OHIO
THIRD APPELLATE DISTRICT

STATE OF OHIO,
Plaintiff-Appellee,

vs.

STEPHEN PAUL KORN,
Defendant-Appellant.

Case No. 9 79-7

TRIAL COURT'S SETTLEMENT AND APPROVAL OF THE APPELLANT'S STATEMENT AND APPELLEE'S OBJECTIONS

This matter came on to be heard on the defendant's plea of not guilty to a charge of driving 71 miles per hour in a 55 mile per hour zone, on U. S. Route 23, passing through Marion County, Ohio on November 25, 1978.

On behalf of the State, Officer Seigler of the Ohio State Patrol testified that as he approached and met the defendant's auto he observed the defendant to be exceeding the speed limit of 55 m.p.h., his judgment being confirmed by the radar and supported by his observation that the defendant has just overtaken and passed six other autos in succession. He testified

further that the MR 7 radar device he was using indicated a speed of 71 m.p.h., in the moving mode, that there were no vehicles or objects between him and the defendant's auto and that the defendant's auto was nearest the cruiser.

The officer testified further that he had eleven years service with the State Highway Patrol, that he had received standard formal instruction in use of the moving radar, that he holds a certificate of training completion for the MR 7 and another type radar, that he was experienced in its use and that he has served as an instructor of other patrolmen in the use of the MR 7 moving radar device.

The officer explained the operation of the device and testified that he had operated it according to the manufacturer and Highway Patrol instructions, and testified that it was in proper working order when he used it to verify defendant's speed.

He explained the manner in which the device is calibrated, or tested, and that he had properly calibrated it shortly before its use that day. Such

calibration included the use of tuning forks. Each of such forks is marked with the miles per hour which the radar device should register when the struck fork is held near it. If the radar does not register the same as the m.p.h.'s called for by the particular fork then the machine is not used. He found no difference between the forks used and the radar read-out. In the moving mode test two such forks, marked with different m.p.h.'s are struck at the same time and held to the device. The MR 7 should then properly register the difference between the two forks. If the read-out is not the difference between the forks, the radar device is not used. The officer testified that he had made this test and that the radar reading was correct with the difference between the forks.

The defendant objected to the admission into evidence of the radar reading of 71 m.p.h., on the ground there was no expert testimony concerning the internal construction and mode of operation of the device. The trial court admitted the result of the radar read-out, judicially noticing that the MR 7

moving radar device, using as it does sound and scientific principles, is now acceptible and its results admissible in evidence in evidence without independant expert testimony. The court found further that the particular device was in good working condition that day and that the officer was qualified by training and experience to operate the machine.

The defendant in support of his contention referred to State v. Shelt, 46 Ohio App. 2nd 115, without reference to the announcement by the judges of that court that henceforth it could be judicially noticed that the MR 7 moving radar device would be acceptable without expert testimony, present proof of its proper operation and of the qualification of the operator.

The defendant challenged the constitutionality of the Ohio speed law, R.C. 4511.21, as being unconstitutionally vague. The judge disallowed the challenge.

The defendant complained further that there was no evidence that the speed charged was unreasonable

for the time and place, the speed charged being 71 m.p.h. in a 55 m.p.h. zone. The judge explained to him the absolute nature of the 55 m.p.h. speed limit in Ohio.

The defendant complained too, that the traffic ticket failed to state the paragraph of R.C. 4511.21 under which he was charged. The objection was not sustained.

A motion for directed verdict at the conclusion of the State's case was overruled.

The defendant testified and admitted on cross-examination that he was exceeding the speed limit at the time the officer observed him.

Defendant insisted he was on Route I-75 rather than Route 23 when cited.

The trial lasted approximately an hour and a half.

The defendant was found guilty, was inquired of as to further statement and was fined $25.00 and costs, payment of which was deferred pending appeal. The defendant at no time requested a record be taken.

The above statement of the essential evidence and procedure constitutes the trial court's settlement and approval. Any of appellant's statements which are inconsistent with or contrary to the above are disapproved.

Charlton Myers
JUDGE

IN THE MARION MUNICIPAL COURT FOR MARION COUNTY, OHIO

STATE OF OHIO,
PLAINTIFF, CASE NO. 78 TRD 11,347

VS.

STEPHEN PAUL KORN, JUDGMENT ENTRY
DEFENDANT

This day being the 8th day of February, 1979, this cause came on for trial based upon a complaint filed November 27, 1978, alleging the defendant had violated Section 4511.21 of the Ohio Revised Code, the same being a charge of Speed, and the defendant's plea of "Not Guilty."

Defendant appeared without counsel and the State of Ohio was represented by Jon Williamson, Police Prosecutor.

Witnesses were sworn and testimony given and the Court made a finding of guilty.

WHEREFORE, the defendant, having made such statement as he wished to make after verdict and before sentence, was fined the sum of twenty-five dollars ($25.00) and court costs.

Charlton Myers
JUDGE

APPROVED:

Jonathan Williamson
Prosecutor

FILED
MAR 14 1979
MARION MUNICIPAL COURT

IN THE UNITED STATES SUPREME COURT
ON APPEAL FROM A JUDGMENT
OF THE SUPREME COURT
FOR THE STATE OF OHIO

STEPHEN PAUL KORN
Defendant/Appellant

-v- Case #_____

THE STATE OF OHIO
Plaintiff/Appellee

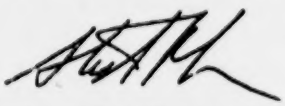
NOTICE OF APPEAL

Noting that a fair trial in a fair tribunal is a basic requirement of due process, and stating that the Defendant, STEPHEN PAUL KORN, has been denied both a fair trial and a fair tribunal in the Trial Court, the Court of Appeals, and the Supreme Court for the State of Ohio, notice is hereby given that STEPHEN PAUL KORN appeals the above entitled cause, from the judgment rendered by the Supreme Court for the State of Ohio, on June 20, 1980, bearing Ohio

State Supreme Court number 80-638. This appeal to the United States Supreme Court is taken under the authority of 28 U.S.C.A. 1257(2).

The notice of appeal was filed on August 21, 1980, pursuant to Rule 28.2 of the Rules for the Supreme Court of the United States, in the Third District Court of Appeals for the State of Ohio, the Supreme Court for the State of Ohio, and with the United States Supreme Court.

Respectfully submitted by



Stephen P. Korn
Defendant/Appellant

Stephen P. Korn
17615 Adrian Road
Southfield, Michigan 48075
1-313-353-1240

AFFIDAVIT OF SERVICE

STATE OF MICHIGAN)
COUNTY OF OAKLAND) SS:

Stephen P. Korn, being duly sworn, deposes and says that on the 28th day of August, 1980, he placed in the United States Mail, postage prepaid and first class, three copies of the Appendix to the Jurisdictional Statement, and three copies of the Affidavit of Service, attached thereto, properly addressed to the attorney for the Plaintiff/Appellee, to wit, The State of Ohio, Jonathan Williamson, Assistant Law Director, City of Marion Ohio, 233 West Center Street, Marion, Ohio 43302.

Respectfully submitted by

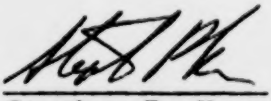
Stephen P. Korn
Defendant/Appellant

Subscribed and sworn to before me
this 28th day of August, 1980.

Monte M. Korn
Notary Public, Oakland County,
Michigan
My commission expires 8/23/81

This Appendix to Jurisdictional Statement

is respectfully submitted by:



Stephen P. Korn
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